

The record considered by the Board includes the transcript of the October 15, 2002 preliminary hearing and all exhibits attached thereto, the transcript of the April 1, 2003 motion hearing together with the exhibits attached, and the pleadings and other documents contained in the administrative file.

ISSUES

This is an appeal from the hearing and Order on claimant's Motion for Penalties Pursuant to K.S.A. 44-512a filed February 5, 2003. Respondent contends the assistant director "exceeded his jurisdiction and erred in ordering penalties against the Respondent pursuant to K.S.A. 44-512b for alleged failure to pay temporary total disability benefits." ¹

Claimant argues the assistant director's Order should be affirmed in part and reversed in part. Claimant wants the Order for interest penalties pursuant to K.S.A. 44-512b affirmed. In addition, claimant argues the assistant director erred in not also awarding civil penalties against respondent pursuant to K.S.A. 44-512a.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Following a preliminary hearing on October 15, 2002, Judge Howard entered an Order for respondent to pay ten weeks of temporary total disability compensation and authorizing Dr. Robert Haas to treat claimant. Thereafter, respondent paid to claimant the ten weeks of temporary total disability compensation and paid for the claimant's medical treatment provided by Dr. Haas.

Dr. Haas kept claimant off work until December 23, 2002, at which time he found claimant's condition had stabilized and that claimant could be discharged from his care. On December 24, 2002, claimant's counsel sent a certified demand letter to respondent's insurance carrier and their attorney for:

[C]ompliance with Judge Howard's Order of October 15, 2002 for payment of medical benefits now due and for payment of temporary total disability benefits while Mr. MacDonnell remains off work. Please consider this a formal demand pursuant to § 44-512a and further that I will seek civil penalties if payment for benefits are not made within the next 20 days. ²

On February 5, 2003, claimant filed a Motion for Civil Penalties Pursuant to K.S.A. 44-512a. That motion sought a civil penalty pursuant to K.S.A. 44-512a in an amount of not more than \$100 per week for each week that disability compensation is past due. Respondent's counsel replied to claimant's demand letter and motion with a letter of February 19, 2003, pointing out that respondent had paid the ten weeks of temporary total disability compensation that was ordered and had also paid for the authorized medical

¹ Application for Review before the Workers Compensation Board of Appeals and Docketing Statement (filed April 14, 2003).

² Motion Trans. Cl. Ex. 1.

treatment with Dr. Haas as ordered. Respondent's position was that all of the benefits ordered by Judge Howard had been paid.

At the April 1, 2003 hearing on claimant's motion before Assistant Director Kenneth Hursh, it was claimant's position that respondent was liable for more than ten weeks of temporary total disability compensation because Dr. Haas the authorized treating physician had kept claimant off work for an additional tens weeks. Respondent countered that Judge Howard had only ordered respondent to pay ten weeks of temporary total disability compensation and that is what respondent paid. If claimant was seeking additional weeks of temporary total disability compensation then claimant needed to file for another preliminary hearing and, at that time respondent would present its defense to the compensability of the claim based upon claimant's alleged intoxication at the time of his June 17, 2002, accident.

Assistant Director Hursh agreed that respondent had complied with the terms of Judge Howard's October 15, 2002, preliminary hearing order. Assistant Director Hursh also agreed with respondent that he could not order the additional weeks of temporary total disability compensation claimant was seeking because the hearing was being conducted pursuant to a motion for penalties and it was not, therefore, a preliminary hearing pursuant to K.S.A. 44-534a. Nevertheless, the assistant director determined that there was not just cause or excuse for the respondent's failure to pay the additional temporary total disability compensation claimed and, therefore, interest should be assessed against respondent on the unpaid weeks of temporary total disability compensation for the period of October 15, 2002 through December 23, 2002, a total of ten weeks.

The Board agrees with the assistant director that respondent had complied with Judge Howard's October 15, 2002, Order. Accordingly, claimant's request for penalties pursuant to K.S.A. 44-512a is denied. However, an interest penalty pursuant to K.S.A. 44-512b was also inappropriate, for two reasons. First claimant had not requested an interest penalty in his demand letter, motion, or at the hearing. Respondent had been put on notice only of a hearing for penalties pursuant to K.S.A. 44-512a. The assistant director brought up the issue of a K.S.A. 44-512b interest penalty on his own at the hearing. It was not an issue that claimant had raised nor that respondent was prepared to address. Second, K.S.A. 44-512b is a remedy contemplated to be applied at the time of final award, not pre-award. Subsection (a) of that statute provides, in part;

Whenever the administrative law judge or board finds, upon a hearing conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review of appeal of an award entered in such a hearing, that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee shall be entitled to interest on the amount of the disability compensation found to be due and unpaid at the rate of interest

prescribed pursuant to subsection(e)(1) of K.S.A. 16-204 and amendments thereto.

As the April 1, 2003 hearing on claimant's motion was not conducted pursuant to K.S.A. 44-523, that is to say it was not a regular hearing, the assessment of an interest penalty was inappropriate. Respondent disputes the compensability of the claim, alleging it has a valid intoxication defense. A full hearing has not been conducted on that issue. As such, the determination that respondent lacks, "just cause or excuse" for its failure to pay the additional temporary total disability compensation claimed was premature.

WHEREFORE, the Order entered by then Assistant Director Kenneth Hursh dated April 3, 2003, is reversed.

IT IS SO ORDERED.

Dated this _____ of September 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Anthony S. Paris, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and Continental Western Ins. Co.
Kenneth Hursh, Administrative Law Judge
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director